

December 21, 2011

via electronic filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.

RE: Notice of *Ex Parte* Presentation
Closed Captioning of Internet Protocol-Delivered Video Programming:
Implementation of the Twenty-First Century Communications and Video
Accessibility Act of 2010

MB Docket No. 11-154

Dear Ms. Dortch:

On Monday December 19, 2011, Jim House, Outreach Coordinator for CEPIN at Telecommunications for the Deaf and Hard of Hearing Inc. (TDI), Shane Feldman, Chief Operating Officer, National Association for the Deaf (NAD), Andrew Phillips, Policy Attorney, NAD, Dr. Christian Vogler, Director Technology Access Program, Gallaudet University, Lise Hamlin, Director of Public Policy, Hearing Loss Association of America, Blake Reid, Staff Attorney, Institute for Public Representation (IPR), and Lucas McFarland, Student Research Assistant, IPR (collectively “Consumer Groups”) met separately with: (1) Joshua Cinelli, Media Advisor, Office of Commissioner Copps; (2) Sherrese Smith, Senior Counsel & Legal Advisor, Office of Chairman Genachowski; (3) Dave Grimaldi, Chief of Staff & Media Legal Advisor, Office of Commissioner Clyburn, and Karen Peltz Strauss, Deputy Bureau Chief, Consumer and Governmental Affairs Bureau; and (4) Erin McGrath, Acting Legal Advisor, Media, Office of Commissioner McDowell; to discuss the above-referenced matter.

At these meetings, Consumer Groups noted the increased importance of this matter in light of a recently released study by Johns Hopkins School of Medicine, which found that more than forty-eight million Americans over the age of twelve – almost one in every five people in this country – are deaf or hard of hearing.¹ Troublingly, other data indicates that only forty-eight percent of working-age Americans who are deaf or hard of hearing are employed.² Whether

¹ See Amanda Chan, *1 In 5 Americans Has Hearing Loss: Study*, THE HUFFINGTON POST (Nov. 15, 2011, 4:38 PM EST), http://www.huffingtonpost.com/2011/11/15/hearing-loss-americans-one-in-five_n_1095586.html

² See *Leveraging Higher Education to Improve Employment Outcomes for People Who Are Deaf or Hard of Hearing Before the S. Comm. on Health, Education, Labor & Pensions* (Oct. 11, 2011) (statement of Sen. Tom Harkin),

these tens of millions of consumers are afforded the participatory opportunities of equal access to Internet protocol (IP)-delivered video programming – as Congress intended in passing the Twenty-First Century Communications and Video Accessibility Act (“CVAA”)³ – depends on the Commission’s resolution of several key issues in this rulemaking.

Against this backdrop, Consumer Groups discussed the following issues: the appropriate allocation of responsibility for captioning video programming between video programming distributors (“VPDs”), providers (“VPPs”), and owners (“VPOs”); the scope of content required to be captioned under the CVAA; the importance of captioning performance objectives; and the scope of the captioning capability requirements of section 203 of the CVAA.

Consumer Groups reiterated our belief that the CVAA enables the Commission to allocate responsibility for captioning IP-delivered video programming exclusively to VPDs/VPPs, or to allocate responsibility to VPOs for captioning programming in the first instance and to VPDs/VPPs for enabling the rendering or pass through of captions. We noted, as we have in our previous comments, that it seems most efficient for both consumers, the Commission, and industry for VPDs/VPPs to bear exclusive responsibility for captioning.⁴ We noted, however, that should the Commission choose not to allocate responsibility to VPDs/VPPs beyond the rendering or pass through of captions, VPOs should be responsible for captioning programming in the first instance.

We next noted our position that the Commission should reject attempts to narrow the scope of archival content covered by the CVAA’s captioning requirements. The plain language of the statute requires that once video programming has been published or exhibited on television, any subsequent delivery of that programming online must include captions. For example, the movie “It’s a Wonderful Life” may currently be available online without captions. If this film is shown on television with captions next Christmas – after the effective date of the Commission’s rules – the CVAA plainly requires that any subsequent online distribution of that film must include captions.

We further urged the Commission not to narrow the scope of programming covered by the CVAA’s captioning requirements by adopting an overbroad definition of the term “video clip” or an underinclusive definition of the term “full-length programming.” We reiterated our position that “full length programming” should be defined as any programming not constituting a “video

<http://help.senate.gov/hearings/hearing/?id=ceab647d-5056-9502-5d20-692bc716cd55>

³ See S. Rep. No. 111-386, at 1 (2010).

⁴ Comments of Telecommunications for the Deaf and Hard of Hearing, Inc, et al., FCC Docket No. MB 11-154, at 20 (Oct. 19, 2011), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021715183> [hereinafter Consumer Group Comments].

clip” or “outtake,” and that the Commission should define “video clips” should as video programming that is both (a) promotional or advertising-related and (b) less than 30 seconds in length. We pointed out that both consumers and industry would benefit from the adoption of this bright line rule to avoid confusion over which programming must be captioned, and to eliminate the possibility that VPPs/VPDs or VPOs could avoid the CVAA’s captioning requirements simply by splitting programs into multiple segments for online delivery.

We also noted that alternative proposals, such as the possibility of defining full-length programming as “the entirety of a movie, television show episode, sporting or special event, or news program that appears on television,”⁵ risk, among other things, exempting online news segments from coverage under the CVAA. For example, a recent visit to CNN.com found over 150 video news segments, including breaking news updates and segments of popular shows such as Anderson Cooper 360, ranging from as little as 45 seconds to as long as several minutes. We do not believe Congress could have intended to exempt these important segments from the CVAA’s mandate for equal access, and urged the Commission to adopt definitions that appropriately reflect congressional intent.

Following the above-referenced meetings, Consumer Groups reexamined the text in the CVAA’s legislative history referring to “full-length programming” and “video clips.” We now believe that Congress merely intended to recognize that certain types of “video clips” are not required to be captioned on television – such as advertisements five minutes or less in duration⁶ – and that such “clips” need not be captioned when delivered via IP because they have not been published or exhibited on television with captions. In short, Congress did not intend to create a new class of uncaptioned “video clips” in the context of IP-delivered video programming, but merely sought to clarify that material never captioned on television would fall outside of the CVAA’s IP captioning mandates.

Consumer Groups further stressed the importance of implementing the VPAAC’s performance objectives to ensure that the CVAA’s guarantee of equal access is achieved. Congress contemplated performance objectives in enacting the CVAA, and specifically directed that the VPAAC consider performance objectives.⁷ The VPAAC performance objectives represent a compromise between the needs of consumers who are deaf or hard of hearing and the need for industry to have feasible requirements and are crucial to achieve equal access to IP-delivered video programming. In particular, the ability for a consumer who

⁵ See Comments of the Motion Picture Association of America (MPAA), FCC Docket No. MB 11-154, at 10 (Oct. 19, 2011), *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021715184>.

⁶ 47 C.F.R. pt. 79.1(a)(1).

⁷ See S. Rep. No. 111-386 at 11 (2010).

is deaf or hard of hearing to adjust caption size, color, background color, and placement is analogous to the ability for a hearing consumer to control audio volume, balance, and tone. Moreover, the ability to change font size is particularly important to consumers who are deafblind or have limited vision, who may be unable to read captions unless their size can be increased.

Consumer Groups also emphasized that the definition of “apparatus” under section 203 must include software. Essentially all modern video delivery systems involve software for video playback; accordingly, we believe that any definition of “apparatus” that does not include software risks denying consumers equal access to video programming in contravention of the CVAA’s mandates.

We also reiterated our position that any addition or improvement to captions by an entity other than a video’s copyright holder does not constitute copyright infringement. We noted that any such addition or improvement would at most constitute a non-infringing fair use, and discouraged the Commission from suggesting to the contrary in the context of this rulemaking

Finally, on Tuesday, December 20, 2011, several representatives from the Consumer Groups met with Linda Kinney of the Motion Picture Association of America (MPAA), Susan Fox of Disney, Keith Murphy of Viacom, and Margaret Tobey of NBCUniversal to discuss the MPAA’s recent proposal for captioning archival content.⁸ We expressed numerous concerns about the MPAA’s proposal, including our belief that its timeline is unrealistic and unnecessarily lengthy, the real possibility that the proposal will entail captioning *less* content than is required under the CVAA, and numerous other substantive, logistical, and procedural issues. It is our understanding that various MPAA members and other programming owners will attempt to further revise and develop the proposal over the coming days, but that coordinating the member groups to arrive at a consensus before the deadline imposed by the CVAA may prove difficult. We remain open to continued dialogue with the MPAA and its members, but cannot support the current proposal without substantial revisions to address its shortcomings, and urge the Commission to press forward in developing a strong set of rules implementing the CVAA’s mandates based on the extensive record developed in this proceeding.

Please contact us if we can be of further assistance in this matter.

⁸ See MPAA Notice of Ex Parte Communication in MB Docket No. 11-154 (Dec. 15, 2010), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021750864>.

Respectfully submitted,

/s/

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